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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-138

DELTA COMMUNICATIONS CORPORATION, *Petitioner,*

v.

NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., AND SOUTHERN TELEVISION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR THE RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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September 26, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioner Delta Communications Corporation was the unsuccessful operator of a UHF television station, WHTV, in Meridian, Mississippi, between June, 1968, and October, 1970, when the station ceased operations and subsequently declared bankruptcy. In 1972, it brought this antitrust action as an amended counter-

claim to a suit by its creditor, American Telephone and Telegraph Company ("AT&T"), alleging an illegal conspiracy among that company, the three major television networks, including respondent American Broadcasting Companies, Inc. ("ABC"), and the VHF station in Meridian, WTOK, owned by respondent Southern Television Corporation. The gravamen of this second counterclaim was that these parties had conspired to destroy UHF stations in general, and WHTV in particular, through a wide variety of anticompetitive practices (Pet. App. A., p. A3 and *passim*).

The trial court waived its usual rules to allow wide-ranging discovery over a three-year period. As to ABC, discovery revealed the undisputed facts that:

a. ABC has held an affiliation agreement with WTOK continuously since 1953, allowing that station a first call in the market to broadcast such ABC programs as WTOK chose to its audience of over 32,600 prime time homes, thereby earning ABC revenues from the advertisers on those programs (Pet. App. A, pp. A11-A15; C.A. App. 661, 1277);

b. ABC's survey of WHTV's audience projected only 2476 prime time homes, far below the level of 5000 such homes which ABC routinely required for an affiliation, and WHTV's audience never rose substantially above the initial estimate (Pet. App. A, pp. A6, A13-A15);

c. Almost immediately after petitioner asked to be allowed to telecast ABC programs, ABC made available to WHTV all its programs not taken by WTOK, so that when WHTV went on the air, the vast bulk of its network programming came

from ABC (Pet. App. A, pp. A6-A7; C.A. App. 648-49);[1]

d. WTOK's carriage of ABC programs in prime time remained virtually unchanged from its previous level throughout the period when WHTV was a competitor, actually decreasing during the first two years of WHTV's operations, and WTOK's only increase in ABC programs followed a loss of a comparable amount of NBC programs (Pet. App. A, pp. A67-A72);

e. WHTV voluntarily cancelled its affiliation with ABC long before the end of its first broadcasting season when it received an NBC primary affiliation (C.A. App. 1026, 1449).

Discovery revealed not one iota of evidence of any conspiracy involving ABC (Pet. App. A, pp. A17, A19); indeed petitioner's general manager testified that he did not "have any knowledge of any fact bearing on any conspiracy which might affect Delta" involving any defendant, nor did he know of any person who did (C.A. App. 601-02).

From a full record, the district court carefully "sift[ed] every bushel of speculative chaff suggested by the claimant" but found "not a single grain of antitrust wheat to sustain the claims asserted" (Pet. App. A, p. A1). The court expressly gave petitioner

> the benefit of the doubt in ruling on the pending motions for summary judgment [and] . . . con-

[1] Consistent with its normal business policy, ABC did not pay WHTV for broadcasting ABC programs because the increase in audience from that station was too small for ABC to realize any additional revenues from its advertisers (see Pet. App. A, pp. A11, A30-A31, A33). WHTV's general manager expressed his understanding of ABC's "reluctance to commit rate to WHTV on circulation which you cannot justifiably predict" (C.A. App. 1318).

> structed the strongest tenable delineations of antitrust violations which can be combed from the documents presented. In addition to giving Delta the advantage of structuring for it the best possible legal theories, this court, as required in summary judgment actions, has resolved every issue of disputed material fact in favor of Delta and has drawn every reasonable inference from those facts in Delta's favor on each of the theories constructed.

(Pet. App. A, pp. A3-A4). Its extended review of the particular evidence demonstrated that, even after giving Delta "every favorable inference within reason," there was no substantial factual evidence from which any antitrust violations could reasonably be inferred (Pet. App. A, pp. A15, A17, A19, A20, A25-A27, A29-A30, A31, A32, A50-A51, A60-A74, A80).

The court of appeals affirmed, and on rehearing specifically addressed itself to petitioner's contention that an erroneous standard of summary judgment had been applied. The court expressly pointed out that it "resolved every issue of disputed material fact in favor of Delta and has drawn every reasonable inference from those facts in Delta's favor on each of the theories constructed" (Pet. App. E, p. E4, n. 1), citing this Court's decisions in both *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), and *Poller* v. *CBS*, 368 U.S. 464 (1962). Applying this standard, the court likewise found that no "inference of anticompetitive conspiracy is reasonable" on the record (*Id.*, p. E3).

In the petition for a writ of certiorari, petitioner concedes that the court of appeals' articulation of the

standard was correct (See Pet., p. 12).[2] Petitioner's objection now seems to be that the court did not expressly apply the standard to an "analysis of [all] these detailed conclusions" in the district court's eighty-eight page opinion (*Ibid.*). However, the court stated that it had re-examined the facts in light of the correct rule; it was under no obligation to detail every one of its analyses.

Accordingly, the petition should be denied since it fairly raises only the issue of whether the standard was correctly applied to this particular record in this case. As this Court has repeatedly ruled, such fact canvassing is not a task for or function of the grant of certiorari. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (and cases cited therein).

In any event, as to respondent ABC, the petitioner now expressly abandons virtually all the conspiracy allegations made below and contends only that ABC's agreement with WTOK, allowing that station to broadcast its programs,[3] permits a reasonable infer-

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[2] To the extent petitioner's position may be taken to be that it is entitled to withstand summary judgment upon the concoction of any favorable inference, no matter how contrived or unreasonable in light of undisputed fact, it is frivolous. *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968).

[3] Petitioner's own figures show that in the network season before WHTV went on the air, 1967-68, WTOK broadcast 13 hours of ABC's prime time programs, and turned down 11 hours. When WHTV went on the air in June, 1968, WTOK broadcast 11 hours and WHTV 10.5 hours, with 1.5 hours unbroadcast. In the next network season, 1968-69, WTOK broadcast 11 hours, WHTV 10 hours, and 2.5 were unbroadcast (C.A. App. 434; see Pet. App. A, pp. A70-A72).

ence that ABC joined in a conspiracy to enable WTOK to monopolize the Meridian market and thus destroy WHTV (Pet., pp. 7-8). This contention is completely disposed of by the district court's opinion, analyzing the undisputed facts, on which we rely (Pet. App. A, pp. A60-A74; see also Brief in Opposition of Respondent Southern Television Corp.). *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968).[4]

Accepting petitioner's contention would mean that once Delta announced its intention to enter the Meridian market, ABC was obligated to sever a profitable agreement with WTOK and enter into a profitless one with WHTV or else a conspiracy to monopolize would arise. This contention is supported neither by reason nor law. Even if it be assumed WTOK was a monopolist, a fact plaintiff failed to prove, it still does not follow that ABC could be found guilty of conspiracy to monopolize, because "merely having

[4] *First National Bank* is virtually on all fours with this case insofar as the summary judgment point is concerned. There the petitioner took "the position that the one fact that he has produced, [respondent's] failure to make a deal with him . . . is sufficiently probative of conspiracy to entitle him to resist summary judgment." 391 U.S. at 286. The court stated that it was "only the attractiveness of petitioner's offer that makes failure to take it up suggestive of improper motives." *Id.*, at 279. Nevertheless, because other evidence in the record satisfactorily explained Cities' refusal to accept the attractive offer, the Court sustained summary judgment, explaining: "Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." *Id.*, at 280. Here, all the evidence showed that ABC rejected WHTV's unattractive offer of a tiny audience for its firstcall affiliation, and no inference of conspiracy can possibly arise from such a rejection.

business dealings with a monopolist [is not] sufficient to convict anyone of a violation of the act. Ordinary suppliers and customers are not compelled to boycott a monopolistic business under pain of prosecution." *Lawlor* v. *National Screen Service Corp.*, 1955 Trade Cas. ¶ 68,216 at 71008 (E.D. Pa. 1955); *cf. Columbia Metal Culvert Co., Inc.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 36 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). Thus, no reasonable inference of conspiracy or intent to join in a monopoly could possibly be drawn from ABC's continuation of its existing contract with WTOK, and it is inference alone on which petitioner now relies. There is not a scintilla of hard fact supporting petitioner's claim; indeed, the hard fact is all to the contrary.

Petitioner seeks to divine a "basic error" in the reasoning of the courts below by postulating that they improperly adopted the respondents' view "as to the smallness of petitioner's audience—a matter sharply disputed in the record" (Pet., p. 17), and this in turn became the underpinning for the court's findings that the evidence permitted no inference of conspiracy. This is the only claimed factual dispute to which petitioner points involving ABC—and it is in error. There is not the slightest mention in petitioner's trial papers or in either of its appellate briefs regarding any factual dispute over the size of its audience. WHTV's own general manager admitted that the only survey showing WHTV with a significant audience was an "ARB error" and apologized for the station's "youthful impetuousity" in publicizing the erroneous figures (C.A. App. 1407). ABC estimated petitioner would deliver fewer than 3,000 homes compared to

WTOK's 32,600 (C.A. App. 1277). There is no dispute that that was ABC's estimate and that estimate was the basis for its judgment to continue with WTOK.[8]

Petitioner's remaining contentions are similarly without basis. For example, the district court did not hold that "self-interest justifies antitrust violations" (Pet., pp. 18-21). Rather, it reviewed the record and found that absent any evidence of conspiracy, absent any hard fact, and without nothing to contradict respondents' ample showing that their actions were entirely consistent with their individual, non-conspiratorial, economic interests, there was no basis for reasonably inferring any violation of the Sherman Act.

In the same way, petitioner distorts the district court's decision by characterizing it as requiring "specific predatory *intent* for monopolization" under Section 2 (Pet., pp. 21-25, emphasis added). What the

[8] Petitioner below pointed to the testimony of a former ABC employee, whose personal opinion was that ABC might have done better in the long run by affiliating with WHTV. Even that individual, however, testified specifically that the decision not to do so was made consistently with ABC's routine criteria for affiliation, was due to the smallness of petitioner's audience, and was not the result of any conspiracy or desire to allow WTOK to monopolize the market (C.A. App. 798-804). Faced with this, petitioner now seems to contend, without any basis in fact, that it is entitled to an inference that ABC's routine affiliation criteria are an elaborate subterfuge, a ruse designed to permit it to refuse to affiliate stations when it wanted to conspire with others. That is even more unreasonable than the refusal to deal claim suggested and dismissed on summary judgment in *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). To accept such a contention would be, to paraphrase the Fifth Circuit's words in this case, like permitting an inference that the presence of a frog in a party punch bowl was due to spontaneous generation rather than a mischevious guest (Pet. App. E, p. E2).

district court actually held, consistent with decisions of this Court, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), was that monopoly alone does not constitute a violation of the Sherman Act absent "some predatory or wilful *act*" furthering the monopoly (Pet. App. A, p. A65, emphasis added). It then analyzed the acts alleged by petitioner in furtherance of the monopoly, concluding that Delta had here, as elsewhere, "failed to show any genuine issue existed as to any factual matter which would warrant the inference" that the monopoly was furthered.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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